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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 642

EDWARD H. PHILLIPS and EMMA E. PHILLIPS,
his wife,
PETER F. AMER and MARY AMER,
his wife,
WANDA GOETZ and CHARLES BELL,
Petitioners,

vs.

FRANK A. SAUNDERS and EDITH M. SAUNDERS,
his wife,
HIRAM E. SMITH and LULU E. SMITH,
his wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND AND BRIEF IN SUPPORT OF THE PETITION

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF

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The Daily Record Co., Baltimore 3, Md.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

TO THE HONORABLE, THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Your Petitioners, Edward H. Phillips and Emma E. Phillips, his wife, Peter F. Amer and Mary Amer, his wife,

Wanda Goetz and Charles Bell, pray that a Writ of Certiorari issue to review the Decree of the Court of Appeals of Maryland, passed and filed on December 17, 1948, in the suits entitled Frank A. Saunders and Edith M. Saunders, his wife, Hiram E. Smith and Lulu E. Smith, his wife, Appellants, vs. Edward H. Phillips and Emma E. Phillips, his wife, Peter F. Amer and Mary Amer, his wife, October Term, 148, No. 47 and Wanda Goetz and Charles Bell, Appellants, vs. Hiram E. Smith and Lulu E. Smith, his wife, Appellees, October Term, 1948, No. 46, upon the following grounds and because of the following reasons:

ACTION IN THE STATE COURTS

There were two cases in the Court of Appeals of Maryland. Both cases arose in the Circuit Court for Anne Arundel County, Maryland, sitting in Equity. The first case filed was No. 9103 Equity, Edward H. Phillips, et al., vs. Frank A. Saunders and appears as No. 47 in the Court of Appeals of Maryland. The second case filed was No. 9161 Equity, Wanda Goetz, et al., vs. Hiram E. Smith, et al., and is No. 46 in the Court of Appeals of Maryland. The Honorable William J. McWilliams, Judge of the Circuit Court for Anne Arundel County, passed a Decree on February 28, 1948, in the first filed case, permanently enjoining the Defendants and all persons claiming under them "from suffering or permitting any person or persons of Negro, Chinese or Japanese descent to use or occupy" the lots owned by the defendant Negoes except *bona fide* servants or employees occupying the property in the course of that service or employment (R. 59, 60, 61). On February 27, 1948, the Circuit Court for Anne Arundel County, Maryland, in Equity, passed a Decree in the second case dismissing the Bill of Complaint (R. 38). Appeals to the Court of Appeals of Maryland, the highest Court in the State of Maryland,

were taken by the unsuccessful parties in each case. By the Decree of December 17, 1948, the Court of Appeals of Maryland reversed the Decree of February 28, 1948, and dismissed the bill with costs to the Appellants and by the Decree of December 17, 1948, also affirmed the Decree of February 27, 1948, with costs. The Mandates in both cases were issued by the Court of Appeals of Maryland on December 17, 1948 (R. 84).

QUESTIONS INVOLVED

There are Three Questions involved:

1. Does the action by the Court of Appeals of Maryland in refusing to permit the Petitioners to enforce the restrictive covenant and easement against Negro use and occupancy result in a deprivation by the State of Maryland of the liberty and property of the Petitioners without due process of law, contrary to Sec. 1 of the Fourteenth Amendment of the Constitution of the United States of America?

2. Did the Court of Appeals of Maryland misapply the decisions of the Supreme Court of the United States in the cases of *Shelley v. Kraemer* and *McGhee v. Sipes*, 334 U. S. 1, 92 L. Ed. 845, in that the Court of Appeals of Maryland failed to limit the holding in the cases last mentioned to the facts in those cases, which facts were different from the facts involved in the two cases before the Court of Appeals of Maryland?

3. Were the Negro violators of the restrictive covenant and easement estopped by their conduct from contending in the State Courts that the State Courts had no right or power to enforce the restrictive covenant and easement?

The Court of Appeals of Maryland by its decision in the cases mentioned answered these three questions in the

negative. The Petitioners maintain that all three questions should be answered in the affirmative by this Court.

STATEMENT OF THE CASE

The Petitioners in both of the cases involved in this Petition own residential properties in a development in Anne Arundel County, Maryland, known as "Beachwood Forest". A plat of this development appears on Pages 9 and 10 of the Record. As part of the uniform plan of development, there were a number of restrictive covenants placed upon the developed land. The particular covenant involved in this litigation is the Sixth Covenant, reading as follows:

> "SIXTH: That neither said lot nor any part thereof shall be sold, leased, transferred to or permitted to be occupied by any negro, Chinaman, Japanese or person of negro, Chinese or Japanese descent; this restriction not to include servants or employees of the owners or occcupants of said lot."

The other covenants are concerned with the minimum cost of a residence, the location of outbuildings, prohibitions against keeping of swine, the maintenance of nuisances noxious or dangerous to health, the use or occupation of the lot for manufacturing, brewing, distilling or for the sale of spirituous or malt liquors, and with provisions in regard to the erection of privies and fences. All of the restrictions appear in various deeds (R. 12-13, 71, 72, 74, 76).

It was alleged in the verified Bill of Complaint in the first filed suit that the Petitioners bought their residential properties and erected valuable dwellings and improvements on the lots, relying on the Sixth Covenant against Negro use and occupation (R. 67).

The Trial Court found as a fact, and the finding is supported by the evidence, that the existence of the Sixth

Restriction was known to the Respondents "prior to their purchase of the property" (R. 58; see also R. 77, 78). The Trial Court decided that as to the property involved in the second case filed (No. 46, Court of Appeals of Maryland), the 64.8 acres involved in the second case had been withdrawn from the plan of development and the restrictive covenant did not apply to that land, and hence dismissed the Bill of Complaint in that case. In the case first filed, (No. 47, Court of Appeals of Maryland) the Trial Court found that the lots involved in that litigation were subject to the restrictive covenant. It found that the Respondents were Negroes and used and occupied their properties not as *bona fide* servants or in the course of service or employment. The Trial Court passed a Decree enjoining the use and occupancy by the Defendants and those claiming under them (R. 47-59; 59-61).

The Trial Court filed a written Opinion on February 27, 1948, in regard to both cases. This Opinion appears in the Record, pages 47-59.

The unsuccessful parties appealed in both cases. Between the time of the appeals and the decision of the Court of Appeals, the Supreme Court of the United States had decided and filed its Opinion in the cases of *Shelley v. Kraemer* and *McGhee v. Sipes*, supra, i.e., on May 3, 1948 (R. 81).

The Court of Appeals of Maryland affirmed the Decree dismissing the Bill in the second filed case and reversed the Decree issuing the permanent Injunction in the first filed case. The Court of Appeals rejected the Petitioners' position that the case was not controlled by *Shelley v. Kraemer* and *McGhee v. Sipes*, supra, even though the facts were different and declined to hold that the Petitioners would be denied due process of law if the enforcement of

the restrictive covenant and easement were withheld by the State Courts. The Court of Appeals of Maryland also refused to hold that the Respondents were estopped by their conduct in purchasing and occupying the property with full knowledge of the existence of the valid restrictive covenant and easement, from contending in the State Courts that the State Courts had no right or power to enforce the restrictive covenant and easement. The Court of Appeals was of the opinion that both cases were controlled by *Shelley v. Kraemer* and *McGhee v. Sipes*, and stated:

> "If the Supreme Court did not mean what it said, or said more than it should, or what it should not have said, the responsibility is its and not ours" (R. 82).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Supreme Court of the United States has jurisdiction as conferred by Title 28 U.S.C.A., Sec. 344 (b).

ASSIGNMENT OF ERRORS

The Court of Appeals of Maryland erred:

1. In refusing to permit the Petitioners to enforce the restrictive covenant and easement against negro use and occupancy which resulted in a deprivation by the State of Maryland of the liberty and property of the Petitioners without due process of law, contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States of America.

The Court of Appeals of Maryland stated in its Opinion in this regard:

> "The further argument is made to us that since the Supreme Court held that 'the restrictive agreements, standing alone, cannot be regarded as a violation of

any rights guaranteed * * * by the Fourteenth Amendment' no court should hold that such a restrictive agreement may not be enforced in the courts, when there has been a breach. This argument comes too late. That is precisely what the Supreme Court decided" (R. 82).

2. In misapplying the decisions of this Court in the cases of *Shelley v. Kraemer* and *McGhee v. Sipes* in that the Court of Appeals of Maryland failed to limit the holding in those two cases to the facts in those cases, which facts are different from the facts involved in the two Maryland cases.

In this regard, the Court of Appeals of Maryland stated (after setting out the distinguishing factors):

"These facts do, in some respects, differentiate these cases, but the Supreme Court did not base its decision on the ground that the restrictions were invalid because of the particular facts shown. It held that 'in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the State Courts cannot stand'." (R. 81).

3. In failing to hold that the negro violators of the restrictive covenant and easement were estopped by their conduct from contending in the State Courts that the State Courts had no right or power to enforce the restrictive covenant and easement.

In this regard, the Court of Appeals of Maryland stated:

"The defendants here, by their action in doing what the Supreme Court has said they have a right to do, cannot be estopped from making the defense the Court has said is valid" (R. 81-82).

REASONS FOR ALLOWANCE OF THE WRIT

A Writ of Certiorari should be issued in this case because:

1. The decision of the Court of Appeals of Maryland results in a taking of the liberty and property of the Petitioners without due process of law upon an erroneous application of alleged holdings by this Court in *Shelley v. Kraemer* and *McGhee v. Sipes*. This not only deprives the Petitioners of the value and utility of the restrictive covenant and easement which they purchased for the use and enjoyment of their properties as residential properties, but the decision of the Court of Appeals is a precedent which will govern similar restrictive covenants and easements in similar cases involving a large number of residential properties having substantial value.

2. The Court of Appeals of Maryland has misunderstood and misapplied the holding of the Supreme Court of the United States in *Shelley v. Kraemer* and *McGhee v. Sipes* and has given those cases a broader application than the facts and the decisions in those cases require.

Mr. Chief Justice Vinson states in the Opinion in *Shelley v. Kraemer* and *McGhee v. Sipes:*

> *"It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases."* 92 L. Ed. 850. (Italics supplied.)
>
> * * * * * *
>
> "Upon full consideration we have concluded that *in these cases* the States have acted to deny petitioners the equal protection of the laws guaranteed by the 14th Amendment. Having so decided, we find it unnecessary to consider whether petitioners have been deprived of property without due process of law or denied privileges and immunities of citizens of the United States." (Italics supplied.) 92 L. Ed. 857.

The language of the Opinion indicates, and the law necessarily is, that the decision is limited to the facts in those cases.

The unwarranted extension and misapplication of the holding in these two decisions of the Supreme Court of the United States is also a precedent which will govern similar restrictive covenants and easements in similar cases involving a large number of residential properties having substantial value.

3. The Court of Appeals of Maryland has failed to protect an admittedly valid covenant and easement owned by the Petitioners from a clear, deliberate and intentional invasion of the restrictive covenant and easement by the Respondents. These Respondents *knew before their purchase of their properties and before their use and occupation of those properties* that their use and occupation was forbidden and that such use and occupation would deprive the petitioners of their right to have the properties in the white development free from negro use and occupancy.

The Court of Appeals of Maryland specifically places the responsibility for its decision upon the Supreme Court of the United States. In view of the right of thousands of home owners who live in the type of community which they think wise for the raising of their families and the millions of dollars in property values involved, the Supreme Court of the United States should grant *certiorari*, examine the questions presented and finally decide them.

4. If the purported holdings in *Shelley v. Kraemer* and *McGhee v. Sipes* are as stated by the Court of Appeals of Maryland, then it is the duty of the Supreme Court of the United States to re-examine *Shelley v. Kraemer* and *McGhee v. Sipes* with the full Court and not merely the six

Justices who concurred in those decisions. It is manifest that it would not be in the public interest to have a decision of the Supreme Court of the United States to the effect that under all circumstances a State Court is required to deny due process of law by the last Clause of Article 1 of the Fourteenth Amendment, whereas a State is forbidden by the next preceding Clause from doing this very thing, or that the owner of a residential property having a *valid* restrictive covenant or easement against Negro use or occupancy can under no circumstances find relief in any Court of Justice in the United States if there is a breach of the restrictive covenant or a violation of the easement.

WHEREFORE your Petitioners respectfully pray that this Court issue a Writ of Certiorari to the Court of Appeals of Maryland to certify and send to this Court a full and complete Transcript of the Record herein, to the end that said causes may be reviewed and determined by this Court as provided by law and that the decree of December 17, 1948, may be reversed with costs, and that the Petitioners may have such other and further relief as their case may require.

WILSON K. BARNES,
Attorney for the Petitioners.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The Opinion of the Court of Appeals of Maryland is reported in 62 A. 2d 602-604. The Opinion of the Circuit Court for Anne Arundel County, Maryland, the Trial Court, is not reported but appears in the Record (Record, pages 47-59).

JURISDICTION

Jurisdiction to issue the Writ is conferred by Title 28 U. S. C. A., Sec. 344 (b).

STATEMENT OF FACTS

The Statement of the Facts set out in the aforegoing Petition under the heading "STATEMENT OF THE CASE" is here adopted and set out by reference. This Statement may be supplemented as follows:

Only the facts relevant to the Federal questions involved in these cases have been set out in the Statement of the Case. The facts in regard to whether or not the restrictive covenants under the State Law had been withdrawn in the second case (No. 46, Court of Appeals of Maryland) and the facts in regard to the chain of title in both cases have not been considered. The Court of Appeals of Maryland did not analyze or consider them as that Court was of the opinion that both cases were controlled entirely by the decisions of the Supreme Court of the United States in *Shelley v. Kraemer* and *McGhee v. Sipes.* If these details are thought to be important, they are reviewed by the Trial Judge in his Opinion (R. 47-59).

SPECIFICATION OF ERRORS

The errors of the Court of Appeals of Maryland are set forth in the Petition under the heading "ASSIGNMENT OF ERRORS" and that Assignment of Errors is incorporated herein by reference thereto.

ARGUMENT

I.

THE REFUSAL BY THE COURT OF APPEALS OF MARYLAND TO PERMIT THE PETITIONERS TO ENFORCE THE RESTRICTIVE COVENANT AND EASEMENT AGAINST NEGRO USE AND OCCUPANCY RESULTED IN A DEPRIVATION BY THE STATE OF MARYLAND OF THE LIBERTY AND PROPERTY OF THE PETITIONERS WITHOUT DUE PROCESS OF LAW, CONTRARY TO SEC. 1 OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

A. The restrictive covenant is a valid covenant creating, under the Maryland law, an easement upon the servient tenements of the Respondents in favor of the dominant tenements of the Petitioners.

1. THE COVENANT IS A VALID COVENANT.

a. *Under the Maryland Law*

Under the Maryland Law, covenants of this type against negro use and occupancy have been held valid and enforceable in Maryland. *Meade v. Dennistone*, 173 Md. 295, (1938—Sloan, J.)

b. *Under the Federal Law*

Under the Federal Law, the covenant is valid. *Shelley v. Kraemer*, 334 U. S. 1, 92 L. Ed. 845, at 852. Chief Justice Vinson states in the Opinion of the Court:

> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment."

See also:

Corrigan v. Buckley, 271 U. S. 323, 70 L. Ed. 969, 46 S. Ct. 521 (1926—Sanford, J.).

2. UNDER THE MARYLAND LAW, SUCH A COVENANT CREATES A VALID EASEMENT.

The Court of Appeals of Maryland held in *Meade v. Dennistone*, supra, as follows:

> "The effect of the agreement in evidence here is that each of the signatories granted to all of the others an easement in his or her property, which inures to the benefit, not only of the grantees, but, by its terms, to his, her, and their heirs, personal representatives and assigns."
>
> *Meade v. Dennistone*, 173 Md. 295, at 303.

B. This valid covenant and easement is a property right and gives to the owner of residential property, the right to live in the type of residential community he thinks desirable for himself and for the raising of his family.

The covenant and easement against negro use and occupancy in adjoining property is a right of property. It is also a right in the owner of residential property to be free from a type of neighbor he does not think desirable in the use of his residential property as a home for himself and his family. In other words, the "property" right is intimately and directly connected with the right of the residential property owner to use his property as a home for himself and his family.

C. The protection given this liberty and property by Sec. 1 of the Fourteenth Amendment prohibits a State from depriving the holder of the right from an adequate remedy in the Courts to protect the right.

In the past, States from time to time have attempted by legislation or by judicial action to restrict unduly or un-

reasonably the remedies to enforce a right in the State Courts. These attempts have been held invalid as a deprivation by the State of life, liberty or property without due process of law. In *Brinkerhoff-Faris Trust and Savings Company v. Hill,* 281 U. S. 673, 681-2, 74 L. Ed. 1107, 1114 (1930—Brandeis, J.), Mr. Justice Brandeis, speaking for the Court, summarized the law in this regard, as follows:

> "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

See also:

Natural Gas Pipeline Company v. Slattery, 302 U. S. 300, 310, 82 L. Ed. 276, 281 (1937—Stone, J.);

Truax v. Corrigan, 257 U. S. 312, 334, 66 L. Ed. 254, 263-264 (Taft, C.J.—1921);

Ex-Parte Young, 209 U. S. 123, 145, 52 L. Ed. 714, 723 (1908—Peckham, J.);

In re Flukes, 157 Mo. 125, 57 S. W. 545 (1900—S. Ct. of Mo.).

It is to be noted that in the Dissenting Opinion of Mr. Justice Holmes in *Truax v. Corrigan,* supra, his dissent was predicated upon the proposition that it was an unwarranted extension of the Constitutional protection to call a business "property" within the meaning of Sec. 1 of the Fourteenth Amendment. He states the proposition as follows:

> "By calling a business 'property' *you make it seem like land,* and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed." (Emphasis supplied.)

It is pointed out that in the cases at bar, *land* is involved. The owner of the dominant tenement who purchased the land in good faith and who acquired the benefit of the valid restrictive covenant and easement for a valuable consideration is entitled to have an adequate remedy in the State Courts to vindicate and enforce that right. One of the well-known and long established maxims of Equity Jurisprudence is "Where there is a right, there is a remedy,"—*Ubi Jus, Ibi Remedium.* The failure of the Common Law Judges in England to provide remedies where there clearly were rights was one of the principal reasons which caused the jurisdiction of the Courts of Equity to flourish. This is elementary. See Pomeroy's Equity Jurisprudence (1941), Volume 2, Sec. 423, page 185.

See also:

Holdsworth's History of English Law (1922) Vol. 1, pages 459-467; Vol. 2, p. 512.

It can hardly be thought that it was the purpose of the Fourteenth Amendment to destroy remedies in the State Courts for valid rights! The language is exactly to the contrary—"Nor shall any State deprive any person of life, liberty or property without due process of law,"—and it cannot be supposed that the last clause of Section 1 of the Fourteenth Amendment—"nor deny to any person within its jurisdiction the equal protection of the laws"—*requires* a State to do the very thing which the next preceding clause *forbids* the State to do!

The Fourteenth Amendment was not intended to restore the jurisprudence of the Fourteenth Century. It was intended to preserve and protect rights, not to destroy them.

If there were no restrictive covenant and easement involved, and the State Courts refused to permit a negro to

use and occupy unrestricted land although permitting white citizens or other citizens to use and occupy such land, that would, of course, be a denial of the equal protection of the laws. That, however, is not the situation in the cases at bar. The State Courts have always had and now have jurisdiction to restrain the continued violation of a restrictive covenant concerning the use and occupancy of land. This is an historic, well recognized and established jurisdiction of the Courts of Equity of the State of Maryland. The Injunction passed by the State Court against use and occupancy by the Respondents is not issued *because* they are negroes as such but merely because of the *terms and provisions* of the restrictive covenant and easement. Manifestly, if the restrictive covenant prohibited the use and occupancy of the land by persons of the Caucasian race, there would obviously be no violation of the covenant and the State Courts would not enjoin the use and occupancy by negroes because there would not be any violation of the restrictive covenant and easement. By the same token, if there were a restrictive covenant against use and occupancy by persons of the Caucasian race and a person of that race occupied the land in violation of a restrictive covenant and easement, the State Courts would undoubtedly enjoin that use and occupancy. There is no possible inequality of the enforcement of the law, as the State Courts give their equitable remedies and relief to all persons who apply regardless of race. The Injunction in this case results from the breach of the restrictive covenant, not because of the race of the parties as such.

It cannot be said that the enforcement of the restrictive covenant and easement against negro use and occupancy is a denial to the Respondents of the equal protection of the laws, as the Respondents never had the right in the first place to use and occupy the land. They knowingly and

deliberately purchased restricted, rather than unrestricted, property. The restricted property was subject to a *valid* restrictive covenant and easement against negro use and occupancy. They can rent the property to persons not within the prohibition of the restrictive covenant and easement, but negroes, who are not *bona fide* servants, cannot use and occupy the servient tenement.

II.

THE COURT OF APPEALS OF MARYLAND MISUNDERSTOOD AND MISAPPLIED THE HOLDING OF THE SUPREME COURT OF THE UNITED STATES IN SHELLEY VS. KRAEMER AND McGHEE VS. SIPES AND HAS GIVEN THOSE CASES A BROADER APPLICATION THAN THE FACTS AND DECISIONS IN THOSE CASES REQUIRE.

The decisions in *Shelley v. Kraemer* and *McGhee v. Sipes* are necessarily limited to the facts in those cases.

Mr. Chief Justice Vinson leaves no doubt that this was intended. He states:

> *"It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases."* 92 L. Ed. 850. (Italics supplied.)
>
> * * * * * *
>
> "Upon full consideration we have concluded that *in these cases* the States have acted to deny petitioners the equal protection of the laws guaranteed by the 14th Amendment. Having so decided, we find it unnecessary to consider whether petitioners have been deprived of property without due process of law or denied privileges and immunities of citizens of the United States." (Italics supplied) 92 L. Ed. 857.

The facts in *Shelley v. Kraemer* are quite different from the facts in the cases at bar.

In *Shelley v. Kraemer*, the Trial Court found:

(1) That the agreement had never become effective because it was not signed by all of the property owners.

(2) The negro purchasers had no actual knowledge of the restrictive agreement at the time of making their purchase.

(3) There was no uniformity obtained when the original agreement was signed in 1911 as a number of parcels were then occupied by negroes and continued to be occupied by negroes until the time of suit.

Then too, the requirement of divestiture of title and restraint on alienation for as much as 50 years might well be said to be unreasonable.

These facts distinguished *Shelley v. Kraemer* from the cases at bar as in cases at bar a restrictive covenant was placed on the land as part of a plan for uniform development and was immediately effective. There is no relief prayed which would divest the Respondents of their title in their property but only would restrain their use and occupancy thereof. The Trial Judge found that the Respondents had actual notice of the existence of the restrictive covenants and the uncontradicted evidence is that prior to the advent of the Respondents, the property in the neighborhood had been used and occupied only by white people.

In the *McGhee* case, the facts distinguish it from the cases at bar in that only 80% of the area in question was subjected to the restrictive provision whereas the other 20% of the area was apparently unrestricted. There was, therefore, no uniformity in the application of the restriction to the area in question.

The Court of Appeals of Maryland concedes in its Opinion in the cases at bar that these facts differentiate *Shelley v. Kraemer* and *McGhee v. Sipes* from the cases at bar. Chief Judge Marbury states:

> "These facts do, in some respects, differentiate these cases, but the Supreme Court did not base its decision on the ground that the restrictions were invalid because of the particular facts shown" (R. 81).

But the holding in *Shelley v. Kraemer* and *McGhee v. Sipes* cannot be stronger or more effective than the facts of those cases warrant. It being conceded that the facts in the cases at bar *are* different from the *facts* in *Shelley v. Kraemer* and *McGhee v. Sipes*, it must follow that the cases at bar are not controlled by the *holding* in *Shelley v. Kraemer* and *McGhee v. Sipes*.

III.

THE VIOLATORS OF THE RESTRICTIVE COVENANT AND EASEMENT WERE ESTOPPED BY THEIR CONDUCT FROM CONTENDING IN THE STATE COURTS THAT THE STATE COURTS HAD NO RIGHT OR POWER TO ENFORCE THE RESTRICTIVE COVENANT AND EASEMENT.

A. The Respondents as violators of the restrictive covenant and easement had actual knowledge of the restrictive covenant and easement before they purchased the servient tenements.

The Trial Court found as a fact that the Respondents had *actual knowledge* of the restrictive covenant *before* they purchased the servient tenements. Judge McWilliams states in his Opinion:

> "It is urged that the enforcement of the restriction against colored use and occupancy would result in considerable hardship to the defendants in that they have

> laid out substantial sums of money in improvements to their respective properties. The defendant must have made this contention with their tongues in their cheeks, since they admit that the existence of the restriction was known to them prior to their purchase of the property" (R. 58).

This finding of fact by the Trial Court is supported by the uncontradicted evidence in the case. See the testimony of Hiram E. Smith.

> "Q. You knew they were restricted, did you not? A. I did" (R. 77).

See also the testimony of the Respondent, Frank A. Saunders.

> "Q. Had you signed a contract before you knew about the restrictions or was it—had you signed that contract before you knew about the restrictions? A. No, they told me then there was some restrictions but they didn't think there would be any trouble.
>
> * * * * * *
>
> Q. (The Court) Was it before or after you signed the paper? A. It was before, because she told me over the telephone" (R. 78).

In *Shelley v. Kraemer*, the negro purchasers of the property did not have *actual knowledge* of the restrictive covenant prior to purchase. Mr. Chief Justice Vinson stated in the Opinion:

> "The Trial Court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase." 92 L. Ed. 845, at 848.

B. The deliberate choice of the Respondents to purchase land in a uniform white development subject to the restrictive covenant and easement, actually knowing of the restrictive covenant and easement, with the intention to use and occupy it and actually using it and occupying it in deliberate violation of the restrictive covenant and easement is such an unconscionable and inequitable act that the Respondents should be deemed to have waived or to be estopped from asserting that the State Courts had no right or power to restrain such unconscionable and inequitable conduct.

Whether or not a Court may enforce a restriction against occupancy by Negroes, an Equity Court has traditional inherent power to restrain unconscionable and inequitable conduct in general, whatever it may happen to be.

The Supreme Court of the United States has held that a person may be estopped as a result of his conduct from asserting the invalidity of action by a State as a denial of the equal protection of the laws or the denial of due process of law contrary to the provisions of the Fourteenth Amendment. *St. Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469, 67 L. Ed. 351, 43 S. Ct. 178 (January 2, 1923, McKenna, J.); *United Gas Co. v. Railroad Commission of Kentucky*, 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150 (January 2, 1929, Stone, J.). In these cases the party seeking to raise the constitutional issues had availed itself of the services supplied by the State agency or had invoked the aid of the State Statute alleged to be unconstitutional. It was held that this conduct estopped the party from invoking the protection of the Fourteenth Amendment.

The unconscionable conduct of the Respondents in this case should be no less effective than was the prior incon-

sistent conduct in the *Prendergast Construction Co.* and the *United Gas Co.* cases, to raise an estoppel.

Mr. Justice Peckham, in *Shepard v. Barron*, 194 U. S. 553, 48 L. Ed. 1115, 24 S. Ct. 737 (May 31, 1904), indicated that the estoppel is effective "where it would be unjust to others to permit it to be set up." He stated at page 568 of 194 U. S.:

> "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and *where it would be unjust to others to permit it to be set up.*" (Italics supplied.)

In the present case, the restriction against occupancy by negroes was not dependent upon a certain percentage of property owners having accepted it, but was definite and positive. It was not a mere collateral agreement, but was an equitable servitude or easement upon the property itself, *Thurston v. Minke*, 32 Md. 487; *Clem v. Valentine*, 155 Md. 19, 141 Atl. 710; *Meade v. Dennistone*, 173 Md. 295, 196 A. 330, 114 A. L. R. 1227. The Respondents had full notice of the restriction before they purchased the land. They knew that their presence would be regarded by other lot owners as a nuisance *per se*, and would disturb and destroy their enjoyment of their properties, and would violate their equitable easement in this land. They deliberately purchased the restricted land in open defiance of the rights of others that were known and apparent to them before the purchase. In equity and good conscience they are estopped to challenge the right of a State Court to restrain their inequitable conduct, under those circumstances.

In regard to this proposition, the Court of Appeals of Maryland stated in its Opinion:

> "The defendants here *by their action in doing what the Supreme Court has said they have a right to do,* cannot be estopped from making the defense the Court has held is valid." (Emphasis supplied.)

But the Supreme Court of the United States has not said that the Defendants, the Respondents here, *had a right* to violate a valid restrictive covenant and easement. On the contrary, this Court in *Shelley v. Kraemer* held that the restrictive covenant was a valid restrictive covenant. If the covenant is a valid covenant, it must confer a valid right, and if it confers a valid right, no person has a *right to violate the valid covenant.*

IV.

IF THE PURPORTED HOLDINGS IN SHELLEY VS. KRAEMER AND McGHEE VS. SIPES ARE AS STATED BY THE COURT OF APPEALS OF MARYLAND, THEN IT IS THE DUTY OF THE SUPREME COURT OF THE UNITED STATES TO RE-EXAMINE SHELLEY VS. KRAEMER AND McGHEE VS. SIPES BEFORE THE FULL COURT.

Mr. Justice Jackson, Mr. Justice Reed and Mr. Justice Rutledge took no part in the consideration or decision in the cases of *Shelley v. Kraemer* and *McGhee v. Sipes.* Much of the Opinion of the Supreme Court in those cases is *dicta.* Much of this *dicta* is unsound.

The Supreme Court of United States has held in many cases that the Fourteenth Amendment did not apply to actions by individuals. *United States v. Cruikshank,* 92 U. S. 542, 23 L. Ed. 588 (1876—Waite, C.J.); *Virginia v. Rives,* 100 U. S. 313, 25 L. Ed. 667 (1880—Strong, J.); *United States v. Harris,* 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290 (1883—Woods, J.); *Civil Rights Cases,* 109 U. S. 2, 3 S. Ct.

18, 27 L. Ed. 835 (1883—Bradley, J.); *Corrigan v. Buckley*, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1926—Sanford, J.). This is conceded in the Opinion in *Shelley v. Kraemer*, 92 L. Ed. 845, at 851. Only "State action" is prohibited.

In all the cases cited by Mr. Chief Justice Vinson in the Opinion in *Shelley v. Kraemer*, see Pages 852-854 of 92 L. Ed., the "State action" by the Judicial Branch of the State Government has in all cases been in situations in which the administration or enforcement of a law by a State Court *created* the denial of equal protection of the laws or the abridgment of the privileges or immunities of which denied due process of law. In no case cited by the Chief Justice has it been held to State action within the meaning of Sec. 1 of the Fourteenth Amendment, where a State Court is engaged merely in exercising its regularly constituted jurisdiction, as is the situation in the cases at bar. The clear meaning of the language of the Fourteenth Amendment excludes any such idea that this could be "State action". The language is "No State shall make or enforce any law which shall abridge, etc., etc.". Surely the law by which the ordinary Courts of Justice in the State enforce agreements between private parties in regard to real estate or which prevent the violation of an easement can hardly be a law which denies the equal protection of laws or in any way contravenes the provisions of the Fourteenth Amendment. The State Courts do not enforce these restrictive covenants because they exclude Negroes or Mongolians or Caucasians or any other race; they enforce the covenant because it was the agreement of the parties in regard to their land which enhanced the value of the land and conferred a legal right for which the owner of the dominant tenement paid a valuable consideration. The same process is followed if the covenant were a covenant

against the maintenance of a saloon or the establishment of a building line or any one of a hundred factual combinations about which people agree in regard to their real property. It is entirely relevant to point out that Courts enforce all of these covenants without regard to any consideration except the terms of the covenants and the facts in the case. These covenants are not enforced only in favor of one race against another but are enforced in accordance with their terms regardless of the race of person affected. It is difficult to perceive how this could be State action *denying* equal protection of the laws. On the contrary, it would seem to be State action *guaranteeing* equal protection of the law, as it is the Court's function to enforce the covenants in regard to all races, classes and persons, in exactly the same manner.

The most startling, and it is submitted, the most unsound *dicta* in the case are as follows:

Mr. Chief Justice Vinson in the Opinion in *Shelley v. Kraemer* states at page 856 of 92 L. Ed.:

> *"The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.* The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.
>
> Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert *property rights* which the state courts have held to be created by such agreements. *The Constitution confers upon no individual the right* to de-

> mand action by the State which results in the denial of equal protection of the laws to other individuals." (Italics supplied.)

In the first place, the Fourteenth Amendment did not *create* any rights. This has been held too often to be changed at this late date. The Fourteenth Amendment protected all citizens against State action which would deprive any citizen of the equal protection of the laws or taking his life, liberty or property without due process of law. The Civil Rights Act of 1866 itself (passed before the 14th Amendment was adopted) shows that no new rights were created. The terms of that Act merely confer upon all citizens the same rights which are enjoyed by white citizens.

In the second place, there is no valid distinction between a "personal right" and a "property right". Nothing could be more personal than "property rights." The right to one's own clothing is a property right; the ownership of the food on one's table is a property right; the right to purchase a home in a community where the type of persons one thinks proper and desirable, are all property rights. On the contrary they are individual, natural rights. See Blackstone's Commentaries, Cooley, 4th Ed. (1899), Vol. 1, p. 117 * 128, and p. 118, * 129. The Fifth Amendment and Fourteenth Amendment make no distinction between the protection of rights of life, of liberty or of property. Nor has there ever been heretofore any announced distinction in any judicial decisions, the Attorney for the Petitioners has discovered.

In the third place, the right to enforce covenants in regard to the use and occupation of land was a right at Common Law before the American Revolution. It was a right in the State of Maryland before the Constitution of the United States was framed or adopted. Surely that Constitution *did not take away this right nor did it create the*

right as stated by Chief Justice Vinson. The Fifth Amendment to the Constitution of the United States was intended to guarantee the continuation of this right (among others) so far as any action by the Federal Government was concerned, and it was intended that the Fourteenth Amendment further protect this right against State Action.

In the fourth place, the last part of the second paragraph quoted contains an assumption, *a priori,* of the question at issue.

If these unsound *dicta* are to be raised to the dignity of holdings, then it is submitted that the full Court, not merely six Justices thereof, should have these matters before it for final consideration and determination. These "holdings" would be quite radical and unprecedented departures from the usual concepts of English and American Jurisprudence, heretofore held and accepted. It is contrary to the public interest for the Supreme Court of the United States to make the "departures" without the full advice and concurrence of the full Bench. As Chief Justice Marbury speaking for the Court of Appeals of Maryland aptly said in this connection:

> **"We are not at liberty to decide to the contrary or to attempt to whittle away the effect of such decisions by holding that some of the statements made are dicta. If the Supreme Court did not mean what it said, or said more than it should, or what it should not have said, the responsibility is its and not ours"** (R. 82).

The responsibility is indeed upon this Court. This Court should meet this responsibility.

CONCLUSION

For the reasons above stated, it is submitted that this Court should issue a Writ of Certiorari to the Court of Appeals of Maryland to certify and send to this Court a full and complete Transcript of the Record in these cases, to the end that the cases may be reviewed and determined by the Supreme Court of the United States as provided by law, and that the Decree of the Court of Appeals of Maryland of December 17, 1948, may be reversed with costs.

Respectfully submitted,

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